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JURISDICTIONAL DISPUTES IN CALIFORNIA

By ROBERT G. MEINERS*

Introduction

Where California should have legislation to insure workers the right to choose a union by the democratic designation of the majority, we find emptiness. Of all the great industrial states of the Union, California alone provides no procedure for a majority choice of the workers.¹

At Governor Brown's request, a bill was introduced in the last session of the legislature to eliminate this emptiness and to solve several other problems. The bill would have repealed the present Jurisdictional Strike Act² and replaced it with a new approach. It will be the purpose of this article to examine this new approach. Although the bill did not pass, it is of importance because a similar attempt will almost surely be made in the next session of the legislature.

Present Law a Hodge-Podge

The wisdom of anything less than a complete revision of the existing California Labor Code dealing with collective bargaining may well be questioned. As it presently exists, the code is a hodge-podge of fragments collected from here and there and put together with little or no cohesiveness. For example, we find language taken from various sections of the Norris-La Guardia Act³ appearing under the heading "Contracts Against Public Policy."⁴ We may also find two different parts of Taft-Hartley⁵ joined together as one incongruous whole in the present Jurisdictional Strike Act.⁶

Viewing the present state of affairs realistically, there appears to be little chance of an over-all revision. However, the attempted Jurisdictional Strike Bill which will be the principal subject of this discussion did attempt to add some clarity to the situation.

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¹ Tobriner, *Pat Brown's Ideas on Labor Reform*, 11 FRONTIER 12 (May 1959). In Governor Brown's own words, "California has no machinery whereby employees working in intra-state commerce may select or reject a union as their collective bargaining representative. The result has been detrimental to the best interests of the employees, of organized labor, of the employers and of the public itself." Brown, *Special Message on Labor Management Relations* 7 (January 20, 1959).

² CAL. LABOR CODE §§ 1115-22.

³ 47 Stat. 70, 29 U.S.C.A. § 101 *et seq.*

⁴ CAL. LABOR CODE §§ 920-23.

⁵ Labor-Management Relations Act, Public Law 101, 80th Cong., 1st Sess., 29 U.S.C.A. §§ 141-97.

⁶ CAL. LABOR CODE §§ 1115-22. Section in point is § 1118.

In General

Let us take a look at the bill in general and later look more closely at some of its provisions which seem to invite closer scrutiny.

In general, in its final form, the bill would amend section 56 of the Labor Code and increase from eight to ten, the number of divisions within the Department of Industrial Relations. It would repeal section 65 which gives the department power to investigate and mediate labor disputes and add section 160 giving this power to one of the newly created divisions. This same division would be the administrative agency charged with administering the new Jurisdictional Strike Act. The present Jurisdictional Strike Act would be repealed.

The bill⁷ declares it to be the public policy of the State of California that workers shall have full freedom of association, the right to organize, to bargain collectively and to select their own bargaining representatives. None of these terms is defined and therein lies one of the bill's most serious defects. In the concluding sentence of the public policy statement, jurisdictional strikes are declared to be unlawful.⁸

After giving us the only three definitions contained in the entire bill, *i.e.* "worker," "employer" and "labor organization,"⁹ the bill goes into the question of representation.¹⁰

Here it is significant to note that the bill treats entirely differently the two kinds of disputes which our present Jurisdictional Strike Act lumps together in its definition of a "Jurisdictional Strike" (*i.e.* (1) representation disputes—which union shall represent the employees, and (2) work jurisdiction disputes—which union's members shall perform the job in question). Governor Brown thought this worthy of special mention in his special message to the legislature. He pointed out that the present act,¹¹

... defines a jurisdictional strike as being, among other things, any concerted refusal to perform work or any other concerted interruption of an employer's operation or business arising out of a controversy between two or more unions over which of them has or should have the exclusive right to bargain with an employer on behalf of his employees.

I respectfully submit that this is a representation, not a jurisdictional dispute. The machinery I have recommended would provide for the resolution of such a dispute whereas present law merely provides that an injunction to halt economic action may be sought.

Concerning the question of representation, any labor organization claiming to represent a majority of the workers in a given unit may file

⁷ Assembly Bill 419, California Legislature 1959, Regular (General) Session.

⁸ *Id.* § 1137.

⁹ *Id.* § 1138.

¹⁰ *Id.* §§ 1139-42.

¹¹ Brown, *supra* note 1, at 8.

a representation petition with the newly created division. The division then investigates this claim and holds such hearings and elections as are necessary. First, the appropriateness of the unit is determined. Then, if a majority of the workers in the unit desire to be represented by any petitioning labor organization, that organization is certified as the exclusive bargaining representative of that unit.¹²

Results of such a certification are twofold:¹³

1. The division is precluded from considering a second petition or conducting an election in that unit for either one or two years, depending upon whether or not a collective bargaining agreement is signed. If such an agreement is signed, between the certified labor organization and the employer, no election can be held before the expiration date of said agreement, but in no event will this period exceed two years. If no agreement is signed, a certification will bar an election for one year.

2. Any other labor organization is prohibited, during the one or two-year period, from engaging in striking, picketing or boycotting for the purpose of obtaining a contract, recognition or soliciting members.

Having thus determined the problem of representation disputes, the bill then turns to jurisdictional disputes and its definition of such disputes is confined solely to the question of which of two contesting labor organizations has the right to have its members perform the work.

Any employer who believes himself to be involved in such a situation may petition the division for a determination that a jurisdictional strike exists. So also, any of his workers or any labor organization may file a petition. Once such a petition is filed, the division must summarily investigate the claim and, within forty-eight hours, either dismiss the petition or issue a notice of hearing. If the division does issue such notice, the labor organizations involved in the dispute must cease striking, picketing, boycotting or the work stoppage for the period that the division has jurisdiction over the case. If, as a result of the hearing, the division makes a determination that a jurisdictional strike does, in fact, exist then the labor organizations involved are faced with two alternatives:

1. They may by mutual consent, submit the matter for a final and binding decision to a tribunal of any organization with which they are affiliated.

2. They may by mutual consent, submit the matter for a final and binding decision to arbitration, before a mutually acceptable arbitrator.

But what if they accept neither of the two alternatives within seven days? Then, the bill provides that the division itself determines the work jurisdiction and issues its final, binding decision.¹⁴

¹² Assembly Bill 419, *op. cit. supra* note 7, §§ 1139-42. (Hereafter cited as A.B. 419).

¹³ *Id.* § 1143.

¹⁴ *Id.* § 1144.

Other provisions of the bill include the fact that its provisions are exclusive with respect to the establishment and determination of all rights, duties and remedies concerning representation and claims to jurisdiction. However, this does not preclude the bringing of an action in court for the violation of a collective bargaining agreement.¹⁵

Questions of representation or jurisdictional disputes subject to the Labor-Management Relations Act or the Railway Labor Act are specifically excluded from consideration.¹⁶

Any interested labor organization, any member of an interested labor organization or any interested employer may petition the division for enforcement of the provisions contained in the bill. Here, again, the division must investigate and may hold a hearing. After such a hearing the division may issue an order requiring compliance.¹⁷

The division may petition the superior court for enforcement of its orders¹⁸ and any person or organization aggrieved by a final order of the division may get judicial review.¹⁹

The bill's final provision is the usual severability clause.²⁰

Metamorphosis

The bill was introduced in the assembly on January 20, 1959 and was amended on four different occasions, three of them occurring in the assembly and the fourth in the senate.

a. First Amendment

The first amendment occurred on March 10, 1959 and was by far, the most extensive of the four. Some of the more significant changes which it made are as follows:

The language concerning the public policy of the State of California was changed to make it clear that the representative chosen by majority vote was the exclusive representative of all the employees in the unit. This is similar to the provisions of the National Labor Relations Act.²¹

A significant change in definition was made concerning exemptions from the status of being a labor organization. The original bill precluded groups "knowingly" financed, interfered with, assisted financially, dominated or controlled by an employer. This was broadened to preclude groups "directly

¹⁵ *Id.* § 1145.

¹⁶ *Id.* § 1146.

¹⁷ *Id.* § 1147.

¹⁸ *Id.* § 1148.

¹⁹ *Id.* § 1149.

²⁰ *Id.* § 1150.

²¹ 49 Stat. 449, 29 U.S.C.A. § 141 *et. seq.* (the sections in question are § 1137 of the state act and § 9(b) of the federal).

or indirectly" financed, interfered with, supported or controlled by an employer.

Of more significance is the fact that the amendment added a provision that a group purporting to be a labor organization had the burden of proving that it was "bona fide" if it was not affiliated with a national or international labor organization. This provision is important because by definition a labor organization means a "bona fide organization." Thus if an organization is not bona fide it is not a labor organization. Carrying this further, if two organizations are striking as to which of their members shall perform certain work and one of them is not a labor organization within the meaning of the bill, a jurisdictional strike does not exist and the strike can go on forever.

Some employer groups objected strongly to this change, arguing that it discriminated against independent unions. Labor on the other hand argued that most if not all so-called independent unions were in effect company unions—completely subservient to the employer.

The next significant change provided for a run-off election in the event that no labor organization received a majority.

The language describing the activity that was proscribed during a jurisdictional dispute was changed from the general phrase "other concerted interference" to the more specific "striking, picketing, boycotting or work stoppage." This brought objection from some employer groups for two reasons:

1. Other forms of concerted interference, such as slow downs, refusals to work overtime, etc., would presumably not be included under this more specific language.

2. Under the present Jurisdictional Strike Act, questions of representation are included in the definition of a jurisdictional strike; while under this bill, only work jurisdiction disputes are jurisdictional strikes.

Turning to some of the other changes, we find that in the original bill there were three, not two alternatives open to the labor organizations involved in a jurisdictional strike. The first two have already been mentioned. The third was to submit the matter by mutual consent to the Department of Industrial Relations for final decision. In this connection, it is interesting to note that in the original form, if the disputing labor organizations took no voluntary action to resolve a jurisdictional strike, nothing happened. The Department of Industrial Relations was powerless to act and the employer could not go into court for an injunction. This third alternative was stricken and in its place came the provision that, if the disputing organizations did not take either of the two alternatives open to them, the department itself would step in and determine the controversy.

The final change of significance made by the bill concerned the parties

who could petition for enforcement. As it originally was drafted only members of labor organizations or employers could do so. This was changed also to allow the labor organizations themselves to do so. However, the word "interested" was added as a qualification for all parties. This is puzzling since nowhere in the bill do we find a definition telling us what constitutes an "interested" labor organization, member or employer. Would it enlarge the group to include, for example, secondary employers who are being picketed in accordance with a secondary boycott? The bill does not tell us.

b. *Second Amendment*

This was passed in the assembly on March 31, 1959. The only change which it makes is to exempt from the definition of "worker," newsboys under the age of eighteen. Why they are denied the benefits of the act while their contemporaries working in other industries are protected is not known. In any event, this change could lead to the anomalous, but rather improbable, situation in which two labor organizations were striking to demand that their newsboy members perform the work and such strike would not be a jurisdictional strike and thus could continue interminably.

c. *Third Amendment*

This was passed in the assembly on April 14, 1959 and exempted the state and its subdivisions from the definition of "employer."

d. *Fourth and Final Amendment*

This occurred in the senate on May 11, 1959 and changed the administrative agency which was to administer the provisions of the bill from the Department of Industrial Relations to the newly created division within that department, designated as the Division of Labor-Management Relations.

e. *Attempted Amendments*

Before turning our attention to a detailed analysis of some of the problems presented in the final version of the bill, it is interesting to note some of the attempts to amend it which failed to pass. One of these was introduced by the author of the original bill²² and would have eliminated one word, *i.e.*, "voting." The elimination of this one word would have had far-reaching effects since it would have changed the requirement that to be the exclusive representative of the employees, one needed only a majority of those "voting" in the unit, to the requirement that one needed a majority

²² Assemblyman (now judge) Miller. After proposing this amendment on April 8, 1959 he withdrew it on April 14, 1959. See *ASSEMBLY JOURNAL*, April 8, 1959, at 2213 and *ASSEMBLY JOURNAL*, April 14, 1959, at 2399.

of those "in" the unit, regardless of how many of them voted or failed to vote in the election. Thus, for example, in a unit of one hundred employees, if sixty voted in the election, a labor organization would need thirty-one votes without this proposed amendment but would need fifty-one votes with it.

On at least two occasions, attempts were made to include in the bill, the labor organization unfair labor practices contained in Taft-Hartley.²³

Also, on at least two occasions, attempts were made to exclude agricultural workers from the provisions of the bill.²⁴ At least two assemblymen went on record as opposing the bill "because agriculture is important in our county and this bill was written without taking into account the unique problems of agriculture."²⁵ Reference will be made later to at least one opinion as to the role of agricultural interests in defeating the bill.

In Detail; a Closer Look at Some Provisions; Problems Raised

a. Status of Union Selected Before Enactment of Bill

A major defect of the bill is the fact that its language is not at all clear in several important sections. Rather than settle anything, this would force the parties into litigation. One wonders how much of the ambiguity is purposeful and how much is inadvertent.

One good example of this is the nebulous status of a labor organization which has been chosen by a majority of the workers in a given unit, recognized by the employer and has entered into a collective bargaining agreement with said employer, all of this occurring before passage of the bill. Could a second labor organization demand that a new election be held regardless of the fact that all employees in the unit want the incumbent labor organization and have recently expressed this preference to their employer but without the formality of an election conducted under the auspices of the division?

Section 1139 says that "if a question of representation exists, any labor organization in this State claiming to represent a majority of workers in a unit may file a representation petition with the division." There need be no showing of interest, nor must the filing labor organization produce membership cards.²⁶

²³ See ASSEMBLY JOURNAL, April 8, 1959, at 2214 and ASSEMBLY JOURNAL, April 14, 1959, at 2401.

²⁴ See ASSEMBLY JOURNAL, April 14, 1959, at 2404 and ASSEMBLY JOURNAL, April 16, 1959, at 2506. Compare the following language of Taft-Hartley (*supra* note 5 at § 2(3) "The term 'employee' . . . shall not include any individual employed as an agricultural laborer. . . ."

²⁵ See ASSEMBLY JOURNAL, April 16, 1959, at 2511.

²⁶ Re the absence of a requirement of a showing of interest by producing signed membership cards, see the new provision added by the Landrum-Griffin Act (Labor-Management Reporting and Disclosure Act of 1959, Public Law 86-257, 73 Stat. 519 at § 704(c)).

The only limitation contained in the bill concerning filing for an election occurs after a certification as the exclusive representative (for the one or two year period previously discussed). Such certification, however, only follows an election conducted under the auspices of the division. There is no provision for recognition of collective bargaining agreements entered into before the effective date of the bill. Thus, it would seem that all collective bargaining representatives chosen before passage of such a bill would have to petition the division for an election in order to become "certified." But a further question arises. Can the labor organization file such a petition? This is by no means clear, since the language of section 1139 can be interpreted as meaning that a "question of representation" does not exist unless there are at least two or more labor organizations competing as to which of them represents the workers.²⁷

Perhaps the only safe conclusion to reach on this point would be to say that it would seem that the existence of a contract entered into before passage of such a bill would not be a bar to a petition by another labor organization. The wisdom of such procedure is subject to doubt.

b. Run Off Elections

As previously mentioned, the bill was amended to provide for run off elections in the event that one of two or more competing labor organizations did not obtain a majority vote. This was a perfectly reasonable, even commendable amendment. But again, the language chosen results in ambiguity.

Section 1142 says that,

If the election involves two or more labor organizations and if the election results in no labor organization receiving a majority of the valid votes cast, a run off election shall be conducted between the two labor organizations receiving the largest number of votes.

Two major problems arise:

1. Will those voting be given the opportunity to vote against having any labor organization represent them?
2. Assuming that they will have this choice, does the language of this section mean what it says about requiring a run off election even if a majority of those voting have voted against any labor organization? After all, this would result in "no labor organization receiving a majority of the valid votes cast." Admittedly this would be an absurd result, but it is one that is possible under the ambiguous language of the bill.

²⁷ One possible solution would be to change the wording of the bill to make it similar to Taft-Hartley § 9a which speaks of representatives, "*designated or selected.*" (Emphasis added.) While the bill does contain such language, it appears in the section dealing with public policy (§ 1137) not elections (§ 1139-1143).

Concerning the first point, although it would seem that the workers would have the choice of voting against having any organization represent them, this is certainly not clear from the language of the bill. In fact, one of the objections raised by employer groups was the fact that the language in the public policy declaration did not specifically give the worker the right to refrain from any or all such activities.²⁸

However, by relying on the language of another section, such right may be implied. Section 1140, in speaking of the election which the division holds, says "whether the majority of workers in such unit desire to be represented by *any* petitioning labor organization." (Emphasis added.) This would seem to mean that the worker has the choice as to any or none of the petitioning organizations. Prudence, however, would seem to dictate the desire for a more clearly spelled out legislative intent as to whether or not the worker is to have such a choice.

Turning to the second question, assuming that the worker does have this choice, if a majority of the votes cast are for "no union" must there then be a run off between the two which received the most votes even though a majority of those voting want neither? The above language could be interpreted as requiring this absurd result. It would be reasonable, however, to assume that the legislature in its wisdom would require a run off only if a majority of the employees wanted some union, but were split as to which one they wanted.

c. *Definitions*

Although the act contains fourteen sections and covers approximately six printed pages, there is a paucity of definitions. One good example of the difficulties encountered due to this lack of defined terms, occurs in the section dealing with jurisdictional strikes.²⁹ It says that once a notice is issued by the division, any "striking, picketing, boycotting or work stoppage *as hereinabove defined* . . . shall cease." (Emphasis added.) But the

²⁸ Section 1137 in speaking of "full freedom of association, including the right to organize, to bargain collectively and to designate representatives of his own choosing for the purposes of negotiating the terms and conditions of employment or other mutual aid or protection" does not say that he has the right to refrain from such activity. Compare Taft-Hartley § 7 which, after the affirmative language of the Wagner Act (giving employees the right to form, join, or assist labor organizations, bargain collectively and engage in other concerted activity) adds the words ". . . and shall also have the right to refrain from any or all such activities. . . ." (Emphasis added.)

See also N.L.R.B. Rules and Regulations and Statements of Procedure, § 102.70 (1959) which, in speaking of run-off elections, says, "The regional director shall conduct a run-off election . . . when an election in which the ballot provided for not less than three choices (*i.e.*, at least two representatives and '*neither*') results in no choice receiving a majority. . . ." (Emphasis added.)

²⁹ A.B. 419, § 1144.

words are neither hereinabove nor hereinbelow defined. The act is absolutely silent as to them.

In fact, only three words are defined in the whole act; worker, employer and labor organization. Of these, the most important is the definition of "worker" because the other two definitions are written around it. An employer is one who has one or more "workers" and a labor organization is an organization in which "workers" participate.

1. *Worker*

Looking at this all important definition we see that although the language is brief, it is extremely broad. A worker is "any natural person performing work for wages, salary or other compensation on a commission, piecework or contract basis."³⁰

Thus it would appear that such persons as supervisors and independent contractors would be considered "workers" under the bill. The present Jurisdictional Strike Act uses the word "employees" but does not define it. The bill's definition clearly goes beyond the employer-employee relationship.

The term "worker" appears in at least two other places in the Labor Code but in neither instance is it defined.³¹

2. *Employer*

This too is a broad definition. It includes,

Any individual or type of organization engaged in any business or enterprise in this State which has one or more workers in service under any appointment, contract of hire, or apprenticeship, express or implied, oral or written, irrespective of whether such person is the owner of the business or is operating on any other basis, and includes any person and any organization or association of employers except workers within a collective bargaining unit acting in the interest of an employer, directly or indirectly.³²

Although it may not have been intended, presumably labor organizations would be "employers" within the meaning of this definition.³³

Once again, ambiguity rears its ugly head. Do the words "acting in the interest of" an employer modify "any person and any organization or association of employers" or do they only modify "workers within a collective bargaining unit"? If the other broad language serves as a guide, then it would seem that "acting in the interest of" was intended to include all

³⁰ *Id.* § 1138(a).

³¹ CAL. LABOR CODE §§ 923, 1682(b). The term "worker" is also used without definition in at least three instances in the CAL. INS. CODE §§ 144, 927, 1085.

³² A.B. 419, § 1138(b).

³³ Compare the more definite and specific language concerning when a labor organization is and is not an employer, contained in the National Labor Relations Act § 2(2).

possible employer groups, and the former interpretation is the proper one. If that is so and the bill would make organizations or associations of employers who act in the interest of an employer, themselves "employers" this could lead to the absurd situation in which a Chamber of Commerce or Association of Manufacturers, acting in the interest of an employer, could successfully file a petition with the division for enforcement of a compliance order.³⁴

Under federal law, "agency" is the test for determining when someone will or will not be deemed an employer.³⁵

3. *Labor Organization*

Since the two definitions given above were broad and sweeping, there is no reason why this should not be similar and such is the case. It includes,³⁶

Any bona fide organization or agency or any local unit thereof in which workers participate, directly or by representation and which exists in whole or in part for the purpose of representation of workers in collective bargaining concerning labor-management disputes, grievances, wages, hours and other conditions of employment.

In no case shall the term "labor organization" include any organization, agency, committee or group which is directly or indirectly, in whole or in part, financed, interfered with, supported, dominated or controlled by any employer, and any organization, agency, committee or group which is not affiliated with a national or international labor organization shall have the burden of proving it is bona fide.

Some interesting comparisons can be made between this language and the language of the present Jurisdictional Strike Act. First of all, concerning the requirement that an independent group must prove itself to be "bona fide" (to which some employer groups objected strongly) it does not appear that this language departs greatly from the present Jurisdictional Strike Act. Presently, the requirement is that, "the plaintiff shall have the affirmative of the issue with respect to establishing the existence of a 'labor organization'"³⁷

³⁴ A.B. 419, § 1147 allows such petitions from, *inter alia*, "any interested employer." (Emphasis added). Thus, "interest" has a two-fold importance, *i.e.*, "acting in the interest of" an employer may make one an employer and his own interest in the matter may make him an "interested" employer.

³⁵ The National Labor Relations Act § 2(2) originally included persons, "acting in the interest of . . . an employer" but was changed by Taft-Hartley to include "persons acting as an *agent of* an employer." (Emphasis added.)

³⁶ A.B. 419, § 1138(c). Compare the somewhat similar language of the National Labor Relations Act § 2(5). "The term 'labor organization' means any organization of any kind or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, or dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."

³⁷ A.B. 419, § 1117.

Secondly, the bill's definition is both more and less restrictive than the present act's. It is more restrictive in that the present act uses the words "in whole or in part" to modify only one situation which will disable an organization from qualifying as a labor organization, *i.e.*, employer financial assistance.³⁸ The bill, however, would use "in whole or in part" to modify all of the disabling situations, *i.e.*, financial assistance, interference, support, domination or control.

On the other hand, it is less restrictive in that it speaks of the disabling situations only in the present tense, *i.e.*, "... in no case shall the term 'labor organization' include any . . . group which *is* . . . supported, dominated . . ." etc. (Emphasis added.) The present act, however, gives a one year retroactive effect to any of these disabling situations.³⁹

In other words, under the present act, if an action is commenced and it can be shown that an employer has aided, at any time within the past year, in financing the group which claims to be a labor organization, it will not be able to qualify as such. However, under the bill, if the group is not presently being financed by the employer, it would seem that it can qualify as a labor organization.

Query, was the changing of the definition to make it both more and less restrictive, at one and the same time, intentional?

d. *Duty to Bargain*

Of what avail is it to have all the machinery that this bill provides for the determination of a bargaining representative if there is no duty on the part of the employer to bargain? The absence of such a duty would seem to vitiate this extensive plan. Unfortunately such a duty is conspicuous by its absence in the bill.

Of course, this absence may have been the result of a belief that such a duty already existed under the law of California. A detailed analysis of the cases dealing with this point is beyond the scope of this article. It will be sufficient to point out that reasonable men could have differed, based upon their interpretation of the cases.

Such is no longer the situation. In the recent case, *Petri Cleaners Inc. v. Automotive Employees*,⁴⁰ our Supreme Court spoke with certainty on the

³⁸ *Ibid.* The entire disabling language is, "... which labor organization is not found to be or to have been *financed in whole or in part*, interfered with, dominated or controlled by the employer or any employer association within one year of the commencement of any proceeding brought under this chapter." (Emphasis added.)

³⁹ See the last thirteen words of the quotation in note 38 *supra*.

⁴⁰ 53 Cal.2d ___, 2 Cal. Rptr. 470, 349 P.2d 76 (1960) (rehearing denied February 24, 1960). At 2 Cal. Rptr. 470, 481 (349 P.2d at 87) the court reviews three of the leading cases argued by defendant for the proposition that such a duty did exist.

subject and came to the conclusion that no such duty exists. They also said,⁴¹

It is for the Legislature to determine whether voluntary bargaining should now be displaced by a rule compelling the employer to bargain with the representatives of a majority of his employees. . . . A host of problems attend compulsory bargaining that only the Legislature can resolve.

Such a plea should not go unheeded in any future attempt to enact a new jurisdictional strike act.

e. Appropriate and Appropriateness

Hindsight being what it is, it is perhaps too easy for the critic to sit back and point out errors. Yet, when one reviews the provisions of this bill, he is forced, once again, to make a plea for legislative clarity. Another badly ambiguous provision is that for determining exactly what unit shall be the proper unit within which to hold an election to see if a majority of the workers desire representation.

A hypothetical situation would be that in which a labor organization claims to represent all the drivers working for a laundry and that the drivers comprise an appropriate unit for the purposes of collective bargaining. The division has a hearing at which the employer argues that his whole plant is the only appropriate unit, not just the drivers. The division, on the other hand, comes to the conclusion that the proper unit is the drivers and also the mechanics who service the trucks. Query, what is the unit in which we shall have an election?

The bill does not tell us. In section 1140 it says that the division shall ". . . conduct such hearings and elections as are necessary to determine the appropriateness of the unit involved and whether the majority of workers in such unit desire to be represented by any petitioning labor organization." This is clear enough. It tells us that there are two things to be determined:

1. What is the unit and
2. Do the members of the unit want representation?

The next section, however, gives us difficulty. It says that ". . . the division shall determine in each case the appropriate unit for representation by a self-determination election."

A liberal interpretation of this language would seem to indicate that the workers shall participate in two elections, the first to determine whether or not they think that the drivers do constitute an appropriate unit and secondly, if the drivers do so decide, then, do they want to be represented by the petitioning organization. Even this interpretation is not without diffi-

⁴¹ *Id.* at, 2 Cal. Rptr. at 481, 349 P.2d at 87.

culty. What workers should vote on this; the drivers, the drivers and mechanics, or the whole plant? The bill does not tell us.

A further difficulty with this literal interpretation is that contrary to the language of the bill, the division is not determining anything. They are merely rubber stamping or certifying the decision of others.

The second possible interpretation of this language is that the division shall itself determine what shall be the appropriate unit and then the workers decide whether or not they desire representation by the petitioning organization.

If the literal interpretation were to prevail, then this procedure is directly contra to the federal procedure which governs the great majority of collective bargaining elections.⁴²

f. *Requests for Elections*

There is no ambiguity concerning who may ask for an election; it is a labor organization and only a labor organization.⁴³ This is in sharp contrast to the other two instances provided in the bill for petitions to the division.

In the case of a jurisdictional strike not only may a labor organization file a petition, but so also may an employer and an employee.⁴⁴

In the case of a petition for enforcement of the provisions of the bill, the petition may be filed by a labor organization, a member of a labor organization, or an employer.⁴⁵

Why then in this third instance should the ability to file a petition be limited to only one party, a labor organization? Some argue that an employer has no legitimate interest in knowing whether or not his employees either belong or want to belong to a labor organization. This overlooks, however, the fact that, traditionally, during organizational drives, tempers are at the breaking point, tension is rife among the employees and production suffers.

On the other hand, there is the possibility that if an employer were to be able to request an election, he might do so as a union-busting tactic, by forcing an election upon the union at its weakest moment, before it had consolidated its strength with the employees. This argument is somewhat blunted, however, by the fact that there is nothing in the bill to require a

⁴² The National Labor Relations Act in §9(b) makes it clear that the administrative agency determines the appropriate unit, subject to minor exceptions.

⁴³ A.B. 419, § 1139 says that, "... if a question of representation exists any *labor organization* ... may file a representation petition. ..." (Emphasis added.)

⁴⁴ A.B. 419, § 1144. "Any employer whose business becomes involved in a jurisdictional strike ... or any of his workers or any labor organization involved in such strike may petition. ..."

⁴⁵ A.B. 419, § 1147. "Any interested labor organization, any member of an interested labor organization, or any interested employer may seek enforcement of the provisions of this chapter. ..." Already discussed *supra* is the requirement of "interest."

union which lost an election (assuming that another union did not win a majority and become certified) to wait a year, month, week or day before asking for another election, nor is there any requirement that a union which lost an election must stop picketing. The *Petri* case makes it clear that it could continue to picket. Thus, when it deems the time to be ripe it can ask for an election again and again and again. There is no prohibition against frequent elections such as appears in federal law.⁴⁶ The federal law also allows employers, employees and labor organizations to raise the question of representation.⁴⁷

g. *Replacements*

Eligibility to vote is another problem that often arises in any question of representation. Should people out on strike be eligible to vote or should only the people presently working vote, or perhaps should everyone vote? The bill is not ambiguous in this respect. It specifically precludes from voting, anyone employed to replace a striker during a strike. This could lead to a situation in which strikers, who may never be given their jobs back, are the exclusive voters to determine what organization shall represent those on the inside who are presently working.

The danger exists that a few unscrupulous employers might turn a situation in which only those presently working could vote, into a union-busting device. They could fire union sympathizers, replace them with strike-breakers and hold a fast election, secure in the knowledge that the strike-breakers would vote against representation by the striking labor organization.

In this instance, the legislature might do well to emulate the comparable federal statute⁴⁸ which leaves eligibility to vote to the discretion of the administrative agency. This eliminates making iron-bound rules which are inflexible and may work hardships in cases which could otherwise be intelligently settled on a case by case basis.

h. *Loss of Right to Enjoin*

Another significant difference between the bill and the present Jurisdictional Strike Act is that the former makes no provision for an injunction at the request of an individual whereas the latter does. In fact, the present Jurisdictional Strike Act allows an injunction not only where a person is injured but even where he is merely threatened with injury.⁴⁹

An employer is not as unprotected, under the bill, as might appear at first blush. In a jurisdictional strike situation, the division must, within

⁴⁶ National Labor Relations Act § 9(c) 3.

⁴⁷ National Labor Relations Act § 9(c) 1(A) and (B).

⁴⁸ Landrum-Griffin Act, *supra* note 26, § 702.

⁴⁹ CAL. LABOR CODE § 1116.

forty-eight hours, either dismiss the petition or issue notice of a hearing and if it does the latter, any concerted refusal to perform work, striking, picketing, boycotting or work stoppage must stop. If it does not stop, the division can get an injunction to stop it. It is true, however, that the time element here is not as short as that which the employer enjoys under the present act.

In the representation problem, also, once a labor organization has been certified, all striking, picketing and boycotting must stop. Again, the division can get an injunction if it does not stop.

While employers may feel at a disadvantage if they lost the ability to get an injunction, there is merit in the approach taken by the bill. An injunction may be speedy and it may stop a picket line but it does absolutely nothing to heal the underlying problem. As pointed out by Governor Brown in his special message to the legislature, *supra*, the provisions of the bill go to the heart of the dispute and provide machinery for solving it.

Defeat of the Bill

After passing the assembly and being amended in the senate, the bill was before the Senate Labor Committee. Interest was running very high. As one report said, "The Labor Committee . . . held the hearing on A.B. 419 before one of the largest audiences in many years, estimated at upwards of 1,000 persons."⁵⁰

As already pointed out, agricultural interests were extremely interested in the future of the bill since, presumably its provisions would include them. In the words of organized labor,⁵¹

. . . The Associated Farmers, the Farm Bureau Federation, and other reactionary farm and employer groups staged an all-out mobilization effort against the bill, which crowded the capital with misinformed and misled farmers who viewed the measure as an attempt to force compulsory organization on farm workers. The Senate Labor Committee tabled the bill, thereby killing it for the session.

Conclusion

Although the bill died in the last session, it is far from buried. New attempts will be made, probably in the next session, to enact a similar bill. What form should this new bill take? Governor Brown has said,⁵²

Our state law must not be punitive or restrictive. It must assist, not obstruct, the collective bargaining process.

It must be fair legislation, impartial legislation, and it must be effective legislation.

To that statement, this writer can only add a fervent "amen."

⁵⁰ Vallejo News-Chronicle, June 19, 1959.

⁵¹ AFL-CIO, The Sacramento Story 40 (1959).

⁵² Brown, *supra* note 1, at 3.